In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

No. 76-86

McCLATCHY NEWSPAPERS, a corporation; ELEANOR McCLATCHY; C. K. McCLATCHY; BYRON CONKLIN; and CARLO BUA,
Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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Pursuant to Rule 42(3) of the Revised Rules of the United States Supreme Court, Willard and Etta Noble, Respondents, file this brief in opposition to motion filed by the American Newspaper Publishers

Association ("ANPA") for leave to file brief *amicus curiae.*

I.

GROUNDS FOR OPPOSITION

The grounds upon which Respondents oppose the motion of the ANPA are:

(1) That the motion of ANPA does not comply with the requirements of Rule 42(3) of the Revised Rules of the Supreme Court; and

(2) That ANPA has misunderstood the case in a manner indicating its unfamiliarity with the trial record.

II.

ARGUMENT

A. THE MOTION FILED BY ANPA DOES NOT COMPLY WITH RULE 42(3) OF THE REVISED RULES OF THE SUPREME COURT

In September, 1976 counsel for ANPA telephoned Timothy H. Fine, Esq., one of the attorneys for Respondents, and requested a stipulation for the filing by ANPA of a brief *amicus curiae* herein. Mr. Fine refused to so stipulate. Mr. Fine was concerned with ANPA's unfamiliarity with the trial record. As discussed *infra,* a reading of ANPA's brief demonstrates that this concern was well-founded.

Rule 42(3) provides:

> 3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

The motion filed by the ANPA is not in compliance with Rule 42(3) because said motion does not set forth facts or questions of law that have not already been presented by the parties. Nor does the motion set forth reasons for believing that those issues will not be adequately presented by the parties.

On page 3 of its motion, ANPA lists three issues to which it desires to present its views to the Court:

> "(1) Whether the Court of Appeals erred by interpreting the Court's rationale in *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), as automatically declaring illegal per se all vertical restraints on distribution after title and dominion passes in sales transactions, on which there have been conflicting decisions in both the Courts of Appeals and in the District Courts.
>
> "(2) Whether the Court of Appeals should have applied a Rule of Reason inquiry into the inherent unique characteristics which make the nature, purpose, functions and effects of the independent contractor distribution system of marketing daily

newspapers radically different from the marketing of industrial products.

"(3) Whether the Court of Appeals erred in applying the per se *Schwinn* rule without any consideration or finding that the termination of Respondents' distributorship, the conduct complained of, substantially affected interstate commerce."

The issues presented by ANPA are identical to the first two questions presented in the Petition for Writ of Certiorari, No. 76-86, at page 2:

"(1) Does the fact that a restraint of trade is of a type which is unreasonable *per se* dispense with the necessity that it be either in or affect interstate commerce in order that the Sherman Act apply? The court below held that it did.

"(2) Does the rule of *per se* illegality of territorial restrictions of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) apply to the local distribution of daily newspapers? The court below held that it did."

The most cursory comparison of pages 3-23 of ANPA's brief and pages 8-16 of the Petition for Writ of Certiorari deal with precisely the same questions in the same way. In other words, ANPA's brief contains nothing new. Thus, ANPA's motion and brief are not in compliance with the requirement of Rule 42(3) that a brief *amicus curiae* "set forth facts or questions of law that have not been presented, . . . , by the parties."

In addition, Rule 42(3) requires that if the brief *amicus curiae* deals with the same issues presented by

the parties, then the motion to file the brief must set forth "reasons for believing that they [facts or questions of law] will not be adequately presented by the parties." The motion filed by ANPA contains no assertion that the parties have not adequately dealt with the questions sought to be presented by ANPA. In this respect, ANPA's motion is contrary to the dictates of Rule 42(3).

B. ANPA HAS MISUNDERSTOOD THE CASE IN A MANNER INDICATING ITS UNFAMILIARITY WITH THE TRIAL RECORD

The brief sought to be filed by ANPA indicates a lack of understanding of this case based, no doubt, upon its unfamiliarity with the trial record.

On page 3 of its brief, ANPA states:

"One root error of the Court of Appeals was its failure to note that there was no record evidence from which the jury could have found that there was in fact an express or tacit territorial restriction in the contract between McClatchy and the Nobles."

On pages 4-5 of its brief, ANPA states:

"In *McClatchy*, the Nobles were not restrained from selling the Sacramento Bee to any potential purchaser located outside the designated Newsstand 5 area or who might come into that area."

This shows a complete lack of understanding of the issue of claim two—the termination claim. As pointed out by the Court of Appeals there was sufficient evi-

dence that plaintiffs' refusal to agree to a split of their distributorship (Newsstand No. 5) was a substantial factor in their termination. 533 F.2d at 1090. This evidence is set forth in detail on pages 8 through 11 of the Brief for Respondents in Opposition filed on August 20, 1976 with this Court.

As ANPA knows so well, a territorial "split" by a newspaper publisher is a reduction in the size of the territory served by an independent distributor. Newspaper publishers, as the experts so testified, want to limit their independent distributors from growing too big and earning too much money even if they are doing an excellent job. It's essentially a plantation theory of operation. As ANPA is well aware, in order to be effective, a territorial "split" as a matter of simple logic must involve an understanding, express or tacit, between the distributor and the publisher, that the distributor will confine his sales within the boundaries of his newly created smaller distributorship. Otherwise, the purpose and imposition of the "split" would be nullified. The Nobles repeatedly opposed McClatchy's so-called suggestions to be split and they were then terminated. This is the issue pertaining to vertically imposed territorial restrictions—which is ignored by ANPA.

III.

CONCLUSION

Based on the foregoing, Respondents oppose the motion of the American Newspaper Publishers Association for leave to file brief *amicus curiae*.

Respectfully submitted,

G. JOSEPH BERTAIN, JR.,

TIMOTHY H. FINE,

Attorneys for Respondents.

October 12, 1976.